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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHAUN MICHAEL CASE,<br><br>Defendant and Appellant. | H045876<br>(Monterey County<br>Super. Ct. No. SS150065) |

## I. INTRODUCTION

In May 2015, defendant Shaun Michael Case pleaded no contest to possession for sale of a controlled substance (Health & Saf. Code, § 11351)[1] and admitted that he had suffered a prior felony drug conviction (§ 11370.2, subd. (a)). In November 2015, the trial court imposed a split sentence of six years with the first four years to be served in the county jail and the remaining two years to be served under mandatory supervision (Pen. Code, § 1170, subd. (h)). Defendant appealed from the judgment, and in April 2017, we modified a condition of defendant's mandatory supervision and affirmed the judgment as modified. (*People v. Case* (Apr. 18, 2017, H043020) [nonpub. opn.] (*Case*).)[2]

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[2] We take judicial notice of our opinion in *Case, supra*, H043020. (Evid. Code, § 452, subd. (d)(1).)

In October 2017, the Legislature enacted Senate Bill No. 180 (2017-2018 Reg. Sess.), which became effective on January 1, 2018. (See *People v. Grzymski* (2018) 28 Cal.App.5th 799, 802 (*Grzymski*).) The bill amended section 11370.2 "by authorizing sentencing enhancements only for prior convictions that, unlike [defendant's], involved using a minor to commit drug-related crimes" in violation of section 11380. (*Ibid.*)

In February 2018, defendant moved to modify and terminate his mandatory supervision based on the enactment of Senate Bill No. 180, arguing that the legislation applied to him retroactively and mandated that the trial court strike the section 11370.2 sentencing enhancement. The trial court denied the motion. Two months later, in April 2018, the trial court revoked and terminated defendant's mandatory supervision, ordering defendant to serve the balance of his term in the county jail, based on defendant's admission that he violated the conditions of his mandatory supervision. Defendant now appeals from that order, contending that the trial court "exceeded its authority when it modified [his] supervision to include prison time in county jail" for the section 11370.2 sentencing enhancement despite the amendment under Senate Bill No. 180, which he asserts applies retroactively to him.

For reasons that we will explain, we conclude that defendant is not entitled to relief under Senate Bill No. 180 because his judgment was final when the legislation took effect.

## II. FACTUAL AND PROCEDURAL BACKGROUND

In September 2014, police officers searched defendant and located 22.5 gross grams of black tar heroin in one pocket and two hypodermic needles in another pocket. (*Case*, *supra*, H043020, at p. 2.) Defendant admitted that he had been selling heroin for about two months and that he was also a heroin user. (*Id.* at p. 3.)

In April 2015, defendant was charged by information with possession for sale of heroin (§ 11351). The information further alleged that defendant had suffered two prior felony drug convictions (§ 11370.2, subd. (a)).

In May 2015, defendant pleaded no contest to possession for sale and admitted that he had suffered one prior felony drug conviction.[3] Defendant entered his plea and admission with the understanding that he would receive a maximum sentence of seven years.

In November 2015, the trial court sentenced defendant to six years, with the first four years to be served in the county jail and the remaining two years to be served under mandatory supervision. (See Pen. Code, § 1170, subd. (h)(5)(B).) The sentence consisted of a three-year term for the substantive offense and a consecutive three-year term for the section 11370.2 sentencing enhancement. The court dismissed the remaining section 11370.2 sentencing enhancement pursuant to Penal Code section 1385.

Defendant timely appealed, and on April 18, 2017, we modified a condition of defendant's mandatory supervision and affirmed the judgment as modified. (*Case, supra,* H043020, at p. 6.) Defendant did not petition for review in the California Supreme Court, and this court issued the remittitur on June 20, 2017.

While that appeal was pending, defendant appealed from the trial court's denial of his post-judgment motion to correct presentence credits.[4] Pursuant to *People v. Serrano* (2012) 211 Cal.App.4th 496, this court dismissed the appeal as abandoned on January 6, 2017. Defendant did not petition for review of the dismissal order in the California Supreme Court, and this court issued the remittitur on March 8, 2017.

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[3] The district attorney alleged two sentencing enhancements pursuant to section 11370.2, subdivision (a) based on defendant's 2010 conviction of possession for sale of a controlled substance (§ 11351) and defendant's 2014 conviction of transportation of a controlled substance (§ 11352). It is unclear from the record which of the two prior convictions defendant admitted.

[4] We take judicial notice of the docket in *People v. Case*, H043747. (Evid. Code, § 452, subd. (d)(1).)

In November 2017, the probation department filed a petition and notice of a violation of mandatory supervision. The petition alleged that defendant failed to report to probation after his release from custody.

In December 2017, the district attorney filed a declaration and notice of violation of probation, alleging that defendant violated the terms and conditions of his probation because defendant drove on a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)). The district attorney filed a second declaration and notice of violation of probation in January 2018, alleging that defendant violated the terms and conditions of his probation because he possessed a controlled substance (§ 11350, subd. (a)).[5]

In February 2018, defendant moved to modify and terminate his mandatory supervision, contending that Senate Bill No. 180 applied retroactively to him and required the trial court to strike the section 11370.2 sentencing enhancement. The trial court denied the motion, determining that defendant was not entitled to the benefit of the amendment because defendant's "appellate rights have ended." In March 2018, the trial court found defendant in violation of the conditions of his mandatory supervision. The following month, on April 25, 2018, the trial court revoked and terminated defendant's mandatory supervision and ordered defendant to serve the remainder of his sentence in the county jail.

## III. DISCUSSION

Defendant contends that Senate Bill No. 180, which became effective on January 1, 2018, applies retroactively to him. Defendant asserts that the trial court had "broad discretion to . . . revoke, modify, or terminate mandatory supervision" pursuant to Penal Code sections 1170, subdivision (h), 1203.2, and 1203.3, and that because the trial court could have lawfully provided him with relief under Senate Bill No. 180, it

[5] Although both the December 2017 and January 2018 notices alleged that defendant violated the terms of his probation, the notices apparently pertained to defendant's alleged violations of his mandatory supervision conditions.

"exceeded its authority in modifying [his] supervision to punish him as though the enhancement were still punishable." The Attorney General counters that although Senate Bill No. 180 applies retroactively to non-final judgments, defendant was not entitled to relief because the judgment against him was final before the new legislation took effect.

We review the retroactive application of a statute de novo. (*In re Marriage of Fellows* (2006) 39 Cal.4th 179, 183.)

Generally, "where [an] amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed" if the amended statute takes effect before the judgment of conviction becomes final. (*In re Estrada* (1965) 63 Cal.2d 740, 744-748 (*Estrada*).) "This rule rests on an inference that when the Legislature has reduced the punishment for an offense, it has determined the 'former penalty was too severe' [citation] and therefore 'must have intended that the new statute imposing the new lighter penalty . . . should apply to every case to which it constitutionally could apply' [citation]." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600.) Thus, "[a]bsent some indication to the contrary in the bill, courts presume the Legislature intended amendments that reduce the punishment for a crime to apply retroactively, at least in cases that are not yet final. [Citations.]" (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213 (*McKenzie*), review granted Nov. 20, 2018, S251333.)

"Nothing in Senate Bill No. 180 indicates the Legislature intended prospective application only. (Stats. 2017, ch. 677, § 1.)" (*McKenzie*, *supra*, 25 Cal.App.5th at p. 1213.) "Accordingly, Senate Bill No. 180 applies retroactively to cases in which the judgment was not yet final on January 1, 2018 . . . ." (*Ibid.*)

A judgment is final " 'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . .' [Citations.]" (*People v. Kemp* (1974) 10 Cal.3d 611, 614; see also *People v. Vieira* (2005) 35 Cal.4th 264, 306 [" '[F]or the purposes of determining retroactive application

of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.' "].) The time to file a petition for a writ of certiorari in the United States Supreme Court is 90 days after judgment is entered by a state court of last resort or discretionary review is denied by a state court of last resort. (U.S. S.Ct. rule 13.1.)

When a trial court "initially suspends *imposition* of sentence and grants probation, 'no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation.' [Citation.] No judgment has been rendered against him, or ever will be if he successfully completes probation. But if he fails to successfully complete probation and instead violates probation, the trial court may revoke and terminate probation, and then impose sentence in its discretion, thereby rendering judgment. [Citations.] That judgment will become final if the defendant does not appeal within 60 days. (See California Rules of Court, rule 8.308(a).)" (*McKenzie*, *supra*, 25 Cal.App.5th at p. 1214, fn. omitted.)

In contrast, "when the trial court initially imposes sentence, but suspends *execution* of that sentence and grants probation, a judgment has been rendered. [Citation.] That judgment will become final if the defendant does not appeal within 60 days. ([Citation]; see [California Rules of Court,] rule 8.308(a).) If the defendant violates probation, the trial court may revoke and terminate probation, but it must then order execution of the originally imposed sentence; the trial court has no jurisdiction to do anything other than order the exact sentence into execution. [Citations.]" (*McKenzie*, *supra*, 25 Cal.App.5th at p. 1214.)

The procedural posture here is akin to the second situation. Defendant was sentenced to a two-year term of mandatory supervision pursuant to Penal Code section 1170, subdivision (h)(5), which provides that a court "shall suspend execution of a concluding portion of the term for a period selected at the court's discretion." (Pen. Code, § 1170, subd. (h)(5)(A).) The minute order from the November 4, 2015 sentencing

hearing states that "[t]he Court hereby suspends the execution of [two] years of the total term" and places defendant on mandatory supervision. The abstract of judgment indicates that no part of defendant's sentence was stayed. Instead, the abstract states that "[e]xecution of a portion of the total jail time imposed [six years] [was] suspended and deemed a period of mandatory supervision under PC 1170(h)(5)(B) as follows: Suspended portion: 2 years Served forthwith: 4 years." Accordingly, a judgment was rendered when defendant was sentenced on November 4, 2015. (See *Grzymski*, *supra*, 28 Cal.App.5th at pp. 805-806 ["the trial court rendered judgments in 2013 and 2015 when it imposed split sentences" because "[a] split sentence involves imposing the sentence and then 'suspending execution of the concluding portion of [it].' [Citation.]"].)

Defendant appealed from the judgment, and we affirmed the judgment as modified on April 18, 2017. (*Case*, *supra*, H043020, at p. 6.) Defendant did not petition for review in the California Supreme Court, and this court issued the remittitur on June 20, 2017. Thus, the judgment against defendant was final before Senate Bill No. 180 became effective on January 1, 2018. "As a result, the amendments to section 11370.2 do not apply" to defendant. (*Grzymski*, *supra*, 28 Cal.App.5th at p. 806.)

Defendant argues that while "non-finality was a *sufficient* condition for retroactive relief," *Estrada* did not make this "a *necessary* condition." Defendant relies on *McKenzie*, *supra*, 25 Cal.App.5th 1207, *People v. Eagle* (2016) 246 Cal.App.4th 275 (*Eagle*), and *In re May* (1976) 62 Cal.App.3d 165 (*May*) to assert that "a case is not *final* for *Estrada* purposes unless there is a legal or constitutional impediment that would have prevented the legislature from providing for the lesser punishment." However, each of those cases involved the imposition of a suspended sentence and a grant of probation, such that the judgment was final "only for the 'limited purpose of taking an appeal therefrom.' " (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) In *Eagle*, the trial court suspended imposition of sentence and placed defendant on probation, and the People conceded that the suspended imposition of sentence meant that the defendant's judgment

was not final when the statutory amendment took effect and that the defendant was therefore entitled to retroactive relief. (*Eagle*, *supra*, at pp. 278-279.) The Court of Appeal agreed. (*Id.* at p. 279.) In *May*, the proceedings were "suspended," probation was granted, and "no final judgment was entered for the purposes of this case." (*May*, *supra*, at pp. 168-169.) Similarly, in *McKenzie*, the Court of Appeal concluded that the judgment was not final for retroactivity purposes where the trial court had suspended imposition of sentence and granted probation. (*McKenzie*, *supra*, at pp. 1217-1218.) Importantly, the *McKenzie* court observed that "[h]ad the trial court initially imposed sentence . . . and suspended its execution, we would agree that defendant's judgment would have become final 60 days later and he could not now obtain the retroactive benefit of a change in law under *Estrada*." (*Ibid.*)

Defendant attempts to distinguish his split sentence from an execution-suspended sentence by raising the trial court's ability to revoke, modify, or terminate mandatory supervision under Penal Code sections 1170, subdivision (h), 1203.2, subdivisions (a) and (b), and 1203.3. Defendant relies on *People v. Camp* (2015) 233 Cal.App.4th 461, 464 (*Camp*), where the Court of Appeal held that the trial court had the authority to terminate the mandatory supervision portion of the defendant's split sentence upon learning that the defendant was ineligible for mandatory supervision because he was subject to an immigration hold and would be deported when released from custody. However, the court did not address or discuss the finality of the judgment for purposes of appeal or for retroactivity under *Estrada*. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

Moreover, as the Court of Appeal determined in *Grzymski*, "[e]ven if a trial court has authority to terminate mandatory supervision without ordering that the suspended portion of the sentence be served, as *Camp* held, it does not follow that the sentence is therefore not a final judgment under *Estrada*. It is settled that an unappealed order of probation suspending execution of the sentence is final for retroactivity purposes after

60 days, yet such orders are still subject to modification under Penal Code sections 1203.2 and 1203.3, the same statutes that govern the modification of orders imposing split sentences. (Pen. Code, § 1170(h)(5)(B).) And when a trial court sentences a defendant under Penal Code section 1170, which applies not only to split sentences but also to determinate sentences more broadly, under certain circumstances the court may recall the sentence within 120 days of a commitment and resentence the defendant. (Pen. Code, § 1170, subd. (d)(1).) But again, the possibility that a sentence may be recalled does not affect its finality." (*Grzymski, supra*, 28 Cal.App.5th at p. 807.)

Defendant contends that *Grzymski* was wrongly decided because it "focused on imposition of sentence as the test for finality of a judgment," and that approach was rejected by the California Supreme Court in *People v. Chavez* (2018) 4 Cal.5th 771 (*Chavez*). In *Chavez*, the court considered whether a trial court retains jurisdiction to dismiss a criminal action under Penal Code section 1385 after a sentence of probation has been completed, and the court held that it does not. (*Chavez, supra*, at pp. 779-781, 783-784.) Defendant points to the court's statement "that neither forms of probation—suspension of the imposition of sentence or suspension of the execution of sentence—results in a final judgment." (*Id.* at p. 781.) But the court did not consider the finality of the judgment for purposes of retroactivity, nor did it raise *Estrada*. Furthermore, the court expressly acknowledged that finality can have different meanings in different factual contexts. (*Id.* at pp. 785-786.)

For these reasons, we conclude that defendant was not eligible for relief under Senate Bill No. 180 because the judgment against him was final when the legislation took effect.

## IV. DISPOSITION

The April 25, 2018 order is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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**H045876**